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IN

Supreme Court of the United States.

OCTOBER TERM 1883.

No. 12. Original.

In re. JOHN HITZ.

PETITION FOR WRIT OF CERTIORARI.

Order directing Counsel to obtain from Secretary of State Certificate as to *Status* of Petitioner, and Letter of Secretary of State to the District Attorney.

Thomas McGill & Co., Law Printers, Washington, D. C.

Supreme Court of the United States.

No. 12, Original.—October Term, 1883.

Ex parte: In the matter of John Hitz, Petitioner.

Mr. Chief Justice Waite:

As it is conceded that the petitioner is not now in the diplomatic service of Switzerland, and was not when all the proceedings in the Supreme Court of the District of Columbia, subsequent to the indictment, were had, counsel are directed to request the Secretary of State to certify whether John Hitz was at any time accredited to and recognized by the Government of the United States as public or political agent or charge d'affaires of the Republic of Switzerland, and if so, for what period of time and up to and including what date.

24th March, 1884.

Department of State,
Washington, *April* 5, 1884.

A. S. Worthington, Esq.,
United States Attorney,
District of Columbia, Washington.

Sir: Your letter of the 26th ultimo, transmitting an order of the Supreme Court of the United States, which directs you to request the "Secretary of State to certify whether John Hitz was at any time accredited to and recognized by the Government of the United States as public or political agent or *charge d'affaires* of the Republic of

Switzerland, and if so, for what period of time and up to and including what date."

In compliance with the request thus made, I have now to state that on the 25th of May, 1864, Mr. John Hitz presented to this Department his commission from the Government of Switzerland as Consul-General of that Republic to reside at this Capital. On the 26th of the same month the President's *exequatur* was granted to Mr. Hitz in that capacity of Consul-General.

On the 30th of March, 1868, Mr. Hitz enclosed in a letter to the Department a communication from the High Federal Council of Switzerland, accrediting him as political agent of that Republic "near the seat of government of the United States," and at the same time solicited an interview with the Secretary of State for the purpose of formally presenting his letter of credence in that capacity. He was answered on the same day by Mr. Seward, then Secretary of State, according him such interview and fixing the 2d of April, then *proximo*, at noon, as the time. In June, 1870, Mr. Hitz made an application for free entry of goods imported for his use, and on the 28th of that month Mr. Secretary Fish informed him by letter that he (the Secretary) did not find in Mr. Hitz's relations to the United States any ground for continuing such privilege to him. Certified copies of these several letters and documents were forwarded to George B. Corkhill, Esq., United States Attorney, on the 8th of June, 1881, by my predecessor, Mr. Blaine.

On the 16th of September, 1882, Mr. Frey presented his credentials as Envoy Extraordinary and Minister Plenipotentiary of the Swiss Republic to the Government of the United States, and since that date Mr. Hitz has ceased to act as Consul-General, or in any other official capacity, for his government, in its relations with this.

I am sir,

Your obedient servant,

(Signed) FRED'K T. FRELINGHUYSEN.

111-766

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

IN RE JOHN HITZ,
PETITION FOR WRIT OF CERTIORARI. } No. 12. Original.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The United States, by Mr. George B. Corkhill, its attorney in and for the District of Columbia, shews cause, as hereinafter follows, why a writ of *certiorari* should not issue as prayed in the petition of the above-named John Hitz.

It avers that the said John Hitz came within the territory of the United States when a minor, and was there domiciled with his father, who was a citizen of the United States, and that he has ever since continued his domicile therein. That upon attaining his majority he elected to become a citizen of the United States, and has, from his said majority until this date, been engaged in business of various kinds, to wit, that of music teacher, merchant, banker, &c., within the District of Columbia, in said United States. That in May, 1877, he was elected as, and accepted the position of, President of the German-Ameri-

can National Bank of Washington, a body corporate under and by virtue of the laws of the United States, which said body corporate was a National bank, duly organized on the 14th day of May, 1877, under the provisions of Title LXII. C. I. of the Revised Statutes of the United States. That the said The German-American National Bank of Washington transacted business as a National bank in the city of Washington, District aforesaid, where it was organized, from the aforesaid date of such organization until the 1st day of November, 1878, when it was placed in charge of a receiver, and that during the whole of said period the aforesaid John Hitz was, and acted as, its President. That the said John Hitz was, during the whole term of his office as said President, a director and a holder of certain of the shares of stock of the said bank, and that he was, and still is, a citizen of the United States, which citizenship was, and still is, a necessary legal qualification of a director of a National bank.

That the said John Hitz was, for many years, Consul-General of the Swiss Confederation within the United States. That while he was such Consul-General he was, on the 28th day of February, 1868, accredited as political agent of the Swiss Confederation by a certain letter of credence, the original whereof is now on file in the Department of State, in the said city of Washington; a certified copy of this letter is appended to this return, and made part hereof, and it may be translated as follows:

(TRANSLATION.)

"BERNE, *February* 28, 1868.

"*To his Excellency*, MR. WM. H. SEWARD, *Minister, Secretary of State for Foreign Affairs of the United States of America, etc., etc., at Washington:*

"Animated with the desire of always making closer the ties of friendship, and of developing more and more the good relations happily existing between Switzerland and the United States of America, the Federal Council, wishing at the same time to give a signal token of its esteem to the Government of the Union, has conferred to-day upon Mr. John Hitz its Consul General, at Washington, the title and rank of Political Agent of the Swiss Confederation at the seat of Government of the United States of America.

"In having the honor of informing Mr. William H. Seward, Minister Secretary of State of Foreign Affairs of the United States of America of this fact, the Federal Council begs his Excellency to be pleased to recognize Mr. John Hitz in his said capacity, and to give faith and credit to whatever he shall bring to the notice of his Excellency in the name of the Swiss Government, especially when he shall be the organ of the sentiments of friendship and of the lively sympathy which it professes for the Government of the American Union and its institutions.

"The Federal Council eagerly avails itself of this occasion to offer to his Excellency, Mr. William H. Seward, the assurance of its distinguished consideration.

"In the name of the Swiss Federal Council—

"*President of the Confederation:*
(Signed) "DUBS.

"*The Chancellor of the Confederation:*
(Signed) "SCHIESS."

That the said John Hits was duly received and acknowledged by the Secretary of State of the United States according to the tenor of the said letter, and that he continued to act as such Consul General and Political Agent until the 20th day of June, 1881, when his resignation of both of the said appointments was accepted by the Swiss Confederation; that on the 30th day of May, 1881, the Swiss Confederation requested the said John Hitz to resign the said appointments, and that he did resign them on the 15th day of June, 1881, and that since the 20th day of the said June, the said John Hitz has not been nor acted as Consul General or Political Agent of the said Confederation, and has voluntarily remained domiciled at the aforesaid city of Washington, engaging in business of various kinds as a private citizen of the United States.

That on the 17th day of June, 1881, a series of indictments was filed in the Supreme Court of the District of Columbia against the said John Hitz, charging him with certain offences against the provisions of §5209 of the Revised Statutes of the United States, which were alleged to have been committed by him while and as President of the said German-American National Bank of Washington. That one of said indictments was numbered 13,924, as specified in the petition of the said John Hitz, and charges him the said Hitz, as President of the said Bank, with the embezzlement, abstraction and misappropriation of certain securities thereof. That the said John Hitz

filed the following plea to the said indictment; a certified copy of which plea is filed herewith:

"And now comes said John Hitz in his own proper person, and having heard said indictment read to him, says that this court ought not to take cognizance of the supposed offences in said indictment specified; because, protesting that he is not guilty of the same, nevertheless said Hitz for plea to said indictment and to each and every count thereof, says that said John Hitz was born a Swiss citizen, under the jurisdiction of the Swiss Republic, to wit, at Davos, canton of Grison, and that before and at the time of the supposed commission of the alleged offences set out in said indictment, and to the time of finding and filing thereof, he resided in said District of Columbia, holding the places or positions of Consul General and of Political Agent of the Swiss Republic, having been, long before the time of the supposed commission of said offences alleged in said indictment, by the Swiss Republic appointed in due form and accredited the Consul General and the Political Agent for said Republic in the United States of America, and then and there was received, recognized and held by the Government of the United States as such Consul General and such Political Agent.

"And that said John Hitz continued to be such Consul General and such Political Agent, and continued to be recognized as such Consul General and such Political Agent by the Government of the United States, until after the finding and filing in court of said indictment, all of which said John Hitz is ready to verify. Wherefore he prays judgment if the said court now here will or ought to take cognizance of the indictment aforesaid, and that by the court here he be dismissed without day.

"JOHN HITZ.

"I, John Hitz, make oath that the plea by me above subscribed is true in substance and in fact.

"JOHN HITZ."

To this plea the United States demurred as follows; a certified copy of which demurrer is filed herewith:

"And now comes the United States, by Mr. R. Ross Perry, its special attorney, and says that the substituted plea of the defendant, John Hitz, filed on the 3d day of June, A. D. 1882, to the indictment in the above entitled cause, is bad in substance.

"R. ROSS PERRY,
"Special Attorney for the United States."

"NOTE.—It will be argued by counsel for the United States, in support of the above demurrer, that the plea to which it is interposed is double in this, that it contains averments as to three separate matters of fact, to wit: That the defendant, John Hitz, is an alien; that he was Consul General of the Swiss Confederation at the time of the commission of the alleged offenses, and of the finding of the said indictment, and that he was Political Agent of the said Confederation at the said times; to each of which matters the United States is entitled to reply separately.

"R. ROSS PERRY,
"Special Attorney for the United States."

That after argument, the court (WYLIE, J.) sustained the said demurrer, and gave leave to the defendant to plead over.

That the said John Hitz had, and still has the right of having the said proceeding reviewed in error by the Supreme Court of the District of Columbia.

Wherefore the United States, by its said attorney, says: That the writ of *certiorari* ought not to issue in the premises as prayed by the said John Hitz.

I do solemnly swear that I have read the foregoing return by me subscribed, and that the averments therein made are true.

Attorney for the United States
in and for the District of Columbia.

111-766

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1883.

Ex parte
JOHN HITZ. } 12. Original.

Rule on the Supreme Court of the District of Columbia to show cause why writ of Certiorari should not issue, as prayed by the petitioner, JOHN HITZ.

BRIEF IN BEHALF OF PETITIONER.

BY

BENJ. F. BUTLER,
O. D. BARRETT.

Peresford, Pr.,
523 Seventh Street,
Washington, D. C.

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

Ex parte
JOHN HITZ. } 12.—Original.

Rule on the Supreme Court of the District of Columbia to show cause why writ of certiorari should not issue as prayed for by the petitioner, John Hitz.

STATEMENT OF CASE.

In February, 1868, while the petitioner, John Hitz, was holding the position of Consul General of the Swiss Confederation in the United States he received from his government a letter of credence in the usual form, constituting him the Political Agent of said Confederation to this country.

The petitioner presented this letter to the Secretary of State, Mr. Seward, who recognized him in the character of Political Agent, and accorded to him the priviliges to which he was entitled by virtue of said letter of credence.

While acting as such Political Agent, and while being so recognized by the United States, an indictment against the petitioner was found by the grand jury of the United States for the District of Columbia, and placed on file in the Supreme Court of said District.

To this indictment the prisoner in person filed a plea, of which the following is a copy, the heading being omitted:

"And now comes said John Hitz in his own proper person, and having heard said indictment read to him, says that this Court ought not to take cognizance of the supposed offences in said indictment specified; because, protesting that he is not guilty of the same, nevertheless said Hitz for plea to said indictment and to each and every count thereof says that said John Hitz was born a Swiss Citizen under the jurisdiction of the Swiss Republic, to wit, at Davos, Canton of Grison, and that before and at the time of the supposed commission of the alleged offenses set out in said indictment, and to the time of the finding and filing thereof, he resided in said District of Columbia, holding the places or positions of Consul General and of Political Agent of the Swiss Republic, having been long before the time of the supposed commission of said offenses alleged in said indictment, by the Swiss Republic appointed in due form and accredited the Consul General and the Political Agent for said Republic in the United States of America, and then and there was received, recognized and held by the Government of the United States as such Consul General and such Political Agent.

"And that said John Hitz continued to be such Consul General and such Political Agent and continued to be recognized as such Consul General and such Political Agent by the Government of the United States until after the finding and filing in Court of said indictment, all of which said John Hitz is ready to verify. Wherefore he prays judgment if the said Court now here will or ought to take cognizance of the indictment aforesaid, and that by the Court here he be dismissed without day.

"JOHN HITZ."

To this plea a demurrer was filed, of which the following is a copy, heading omitted:

"And now comes the United States, by Mr. R. Ross Perry, its special attorney, and says that the substituted plea of the defendant, John Hitz, filed on the 3d day of June, A.

D. 1882, to the indictment in the above entitled cause, is bad in substance.

"R. Ross Perry,
"*Special Attorney for the United States.*"

"Note.—It will be argued by counsel for the United States, in support of the above demurrer, that the plea to which it is interposed is double, in this, that it contains averments as to three separate matters of fact, to wit: That the defendant, John Hitz, is an alien; that he was Consul General of the Swiss Confederation at the time of the commission of the alleged offences, and of the finding of the said indictment, and that he was Political Agent of the said Confederation at the said times; to each of which matters the United States is entitled to reply separately.

"R. Ross Perry,
"*Special Attorney for the United States.*"

On this demurrer issue was joined, hearing had, and the court held—

First. The plea "valid so far as form is concerned."

Second. The demurrer "as a general demurrer in substance."

Third. The plea bad.

At the hearing the petitioner disclaimed any exemption from criminal jurisdiction by reason either of his citizenship or of his Consul Generalship averred in his plea.

As to citizenship, petitioner, by his counsel, said:

"The averment of Swiss citizenship is but inducement to the averment that the defendant was a political agent of the Swiss Confederation."

And as to the Consul Generalship, said:

"The defendant cannot claim any exemption from criminal jurisdiction by reason of the Consul Generalship averred in his plea. Still this averment serves a purpose in explaining the character of the political agency averred. As Consul General, the defendant represented his nation in its com-

mercial relations in the highest rank known to the laws of nations. It follows that the political agency conferred was in no sense a commercial agency, but must have been a diplomatic agency."

"The three averments in the plea on which the charge of duplicity is made in the demurrer serve each a purpose in establishing the fact of the defendant having been a public minister of a foreign power accredited to the United States, with all the privileges, so far as exemption from criminal jurisdiction is concerned, secured to the highest grade of public ministers by the laws of nations."

Thus the petitioner claimed his privilege solely by virtue of his political agency.

The *learning* by which Mr. Justice Wylie supported his decision, allowing the demurrer, is found in the following extract from his opinion containing all he said relating to the exemption claimed by virtue of petitioner's political agency.

"There is another branch of the case, however, and one which raises the principal question under the plea. It is as to the privilege which the defendant claims under his credentials as a political agent. His letter of credentials, although in French, I have before me, and I will translate it as correctly as I can. It is as follows:

"'BERNE, *28th February*, 1868.

"'TO HIS EXCELLENCY, WM. H. SEWARD,

"'*Minister Foreign Affairs of the U. S. of America:*

[That is not the official designation of the Secretary of State.]

"'Animated by a desire to preserve always the ties of amity and to develop more and more the good relations happily existing between Switzerland and the United States of America, the Federal Council wishing at the same time to give a particular mark of its esteem to the Government of the Union, has conferred this day on Mr. John Hitz, its Consul General at Washington, the rank (*la qualité*) of Po-

litical Agent of the Swiss Confederation near the Government of the United States of America. In having the honor to inform Mr. W. H. Seward, Minister Secretary of State for Foreign Affairs of the United States of America, the Federal Council prays his Excellency to be pleased to recognize Mr. John Hitz in his aforesaid quality, and to accord faith and credit to all that he shall make known (*exposera*) in the name of the Swiss Government, especially when he shall be the organ of the sentiments of friendship and of lively sympathy which it professes for the Government of the American Union. The Federal Council embraces cheerfully this occasion to offer to His Excellency, Mr. Wm. H. Seward, the assurances of its high consideration.'

"That was the letter of credentials presented to the State Department under which Mr. Hitz claims the privilege set up by his plea. It appoints him a political agent, and the political agency is so connected in this appointment with his office of Consul that it seems to me whenever the consular office fails the political agency fails. It was a sort of 'base fee' title to the appointment of political agent. I suppose that the intention of the Swiss President was to attach this political agency in some way to the office of Consul, because the office was conferred upon him as the Consul General of Switzerland.

"There is one thing remarkable about this letter of credentials. I do not see the seal of the Swiss Confederation to it. The credentials of officers from all foreign governments to this Government should be authenticated by the seal of the State sending them. This, however, is a paper without the seal of the State, but purporting to be signed by the President of the Confederation and by the Chancellor. It is a fact known in history that the cantons of Switzerland select certain men as their Federal Council to attend to transact the common concerns of the whole Confederation. Undoubtedly they have a common seal. If it was the object to confer on Mr. Hitz a diplomatic character in regard

to matters which concerned the Confederation, it would have been only according to rule that the seal of the Federation should be upon the letter. However that may be, after an examination of the law as fully as I have an opportunity to make it, I have come to the conclusion that the privilege of an embassador (such as exemption from suit and exemption from prosecution in a foreign country) are inseparable from the diplomatic character. If there be an agent of a foreign government sent to this country for any purpose not of a diplomatic character, he is not entitled to those privileges. Take, for example, the case of commissioners appointed for the simple purpose of adjudicating claims. They are appointed by their respective governments for that purpose, but are not clothed with the diplomatic character, and for that reason are not entitled to the privileges which attach to that function. Such commissioners have no business or negotiations with our Government as such. They have a special commission to investigate claims; and are, therefore, not entitled to diplomatic privileges. And it is so laid down in the authorities.

"Now, if these privileges pertain to the diplomatic character alone, did the defendant (Hitz) possess that character? He was called a political agent, but without any diplomatic powers. He had no authority to transact or even to discuss any matters of business with the Secretary of State, to whom alone, and not to the President, was he accredited. I will refer again to his letter of credence. It gives him the title, the rank (*la qualite*) of political agent. Well, what was this gentleman to do by virtue of this his quality and rank? What is he authorized to do with the Government of the United States? He is authorized to communicate to the Secretary of State the high esteem in which our Government is held by the Swiss Confederation. The President of the Federal Council requests 'His Excellency,' Mr. Seward, to recognize Mr. Hitz in his 'aforesaid rank,' not to do any business with him, but to recognize him as a political agent, and to give faith and credit to all that he shall express in the name

of the Swiss Government, particularly when he shall be the organ of its sentiment of friendship and lively sympathy.

"Mr. Seward is asked to believe all that Mr. Hitz shall say in regard to the friendship of the Swiss Confederation for this country. So long as Mr. Hitz goes to the State Department Mr. Seward is to listen to him and to believe whatever he may say of this sentimental character. He has an unlimited privilege, it seems, to talk in a friendly, sentimental way to Mr. Seward, but no authority is given to transact any business with Mr. Seward.

"Mr. Hitz may go to the State Department as often as he pleases and express the sentiment of his Government to Mr. Seward, and as often as he repeats those sentiments Mr. Seward is asked to believe that he is sincere, but he had no authority to do anything.

"Suppose Kaiser William or Prince Bismarck should send authority, such as this, to the German consul, authorizing him to call at the Department of State and to express to Mr. Frelinghuysen the friendly sentiments of the German Empire toward the United States, and present a letter expressing the wish that Mr. Frelighuysen should believe all that the German consul would say of that kind, what kind of foreign minister would that German consul be by virtue of such credentials? He would be a political agent, undoubtedly—authorized to go and talk with Mr. Frelinghuysen. He might not be able to convert Mr. Frelinghuysen to his arbitrary doctrines, but he would be authorized to talk political questions with him, provided the consul should express none but friendly sentiments for the Government of the United States.

"During the French revolution all Europe swarmed with political agents, sent out by the revolutionary authorities for the purpose of agitating politics. They were, undoubtedly, political agents, but they had no diplomatic character. During our own civil war our Secretary of State appointed political agents to visit Europe, in an unofficial character, for the purpose of promoting the interests of the Govern-

ment. But such agents had no privileges such as attach to the diplomatic character.

"Mr. Wheaton says, page 379, that 'diplomatists are, first, ambassadors and Papal legates; second, envoys, ministers, or others accredited to the sovereign; third, ministers resident accredited to the sovereign; and, fourth, chargés d'affaires accredited to the Minister of Foreign Affairs. The only class of these four to which Mr. Hitz can make any pretension is that of charge d'affaires.

"These are the four classes composing the privileged class. Of course a special minister may be appointed for the purpose of attending a ceremony; and, during his approach to the country, his passage through the country, and his stay in the country, for that purpose, his person will be protected. But then an agent of that kind cannot claim his privilege forever. It is laid down in Wheaton, page 427, that when the object of a mission is fulfilled, as in the case of an ambassador of mere ceremony, or where the mission is special and the object of the negotiations has been attained or has failed, the privilege ceases. If this letter of credentials means anything (and giving it its utmost meaning in favor of the defendant,) it was simply an authority to him to go and see Mr. Seward, and convey to this Government the congratulations of the Swiss Government. That thing cannot be kept up forever. Mr. Hitz cannot be allowed under such a paper as this to carry on business and to commit offenses against our laws, and then when he is indicted, say: 'I am a political agent. I was sent here to congratulate this country in 1868, and to express the friendly sentiments of my Government as often as the Secretary of State would care to hear them.' I think it would be a sham and a mockery of law and of propriety to sustain this plea on that ground. For these reasons, I will allow the demurrer to the defendant's plea."

Thus it appears that the learning of the presiding justice in the court brought him to the conclusion that the Swiss

Confederation perpetrated a huge joke on the petitioner and Mr. Seward *in sending a letter of credence without a seal*, and a letter which authorized the petitioner to *talk* to the Secretary of the State, but not to *transact* any business with him.

A Political Agent Ranks as a Public Minister.

The Honorable Caleb Cushing, while Attorney General, in one of his most carefully prepared opinions, uses the following language:

"The modern law of nations recognizes a class of public officers who, while bearing various designations, which are chiefly significant in the relation, precedence or dignity, possesses in substance the same functions, rights and privileges, being agents of their respective governments for the transaction of its diplomatic business abroad, possessing such powers as their respective governments may please to confer, and enjoying as a class established legal rights and immunities of person and property in the governments to which they are accredited as the representatives of sovereign powers.

"Disregarding questions of dignity, these diplomatic agents might all be denominated either *ambassadors*, because they are immediate officers of the sovereign; or *envoys*, because they are persons sent; or *ministers*, because engaged in service or public duty; or *procurators*, because they are the proctors of their respective governments; or *legates*, because officially employed as the substitute of the superior; or *nuncios* or *internuncios*, because they are messengers to or between governments; or *deputies*, because they are deputed; or *commissioners*, because they hold and discharge commissions; or *chargés d'affaires*, because they are charged with business; or *agents*, because they act for their governments. All these, and perhaps other designations of public ministers, are found in the history of modern negotiations, the *name* having no fixed relation to the functions or power or true nature of the office.

"In the simple indication of duties, these public ministers would be divisible into three obvious subdivisions of difference, namely: First, ambassadors, legates, nuncios, internuncios, envoys, ministers, commissioners, deputies, chargés d'affaires, agents ordinary, and the same extraordinary, that is *special*, since the word *extraordinary* in this relation means that and nothing more; secondly, procurators, ambassadors, legates, nuncios, internuncios, ministers, envoys, commissioners, deputies, chargés d'affaires, agents resident, and the same non-resident or transient; and, thirdly, legates, nuncios, ambassadors, procurators, internuncios, envoys, ministers, commissioners, deputies, chargés d'affaires, agents plenipotentiary, and the same not plenipotentiary, or with limited powers.

"But in the process of time, sometimes to flatter the pride of the sovereign represented, or that of the representative, or that of the government addressed, at other times to indicate shades of difference in functions, or in the place or manner of exercising them—under the influence of these and other causes, arbitrary and artificial distinctions have grown up in the use of titles or names of these officers, which distinctions of name are for the most part independent of, or even absolutely contrary to, the truth and substance of the things they pretend to designate."

7 Atty. Gen. Op., 190–191.

Thus *agent* seems to be a term that was very familiar with one of the most renowned diplomats and jurists of this or any other country, and we find him using it over and over again as representing a class of public ministers.

Again, in the same opinion, Mr. Cushing says: "The Constitution also declares that the President shall nominate, and, by and with the advice and consent of the Senate appoint ambassadors, public ministers and consuls. I have already said, and I repeat, that these words are descriptive of a class existing by law of nations, and they comprehend all which the class comprehends. Ambassadors, public min-

isters, signifies all forms or denominations of persons employable as intermediaries between our own and any other government. Any such intermediary, according to the wants of the service, may be appointed and commissioned by the joint executive power of the United States; and we shall see in the sequel that the President may negotiate a treaty through the intervention of a person not commissioned, or intended to be commissioned, on a nomination to the Senate."

Do., p. 196–197.

"In the Twenty-seventh Congress, an act placed money at the disposal of the President, to enable him to establish the future commercial relations between the United States and the Chinese empire on terms of national equal reciprocity; providing only 'that the annual compensation to any one person employed under this act shall not exceed the sum of nine thousand dollars, exclusive of outfit;' and 'that no *agent* shall be sent by virtue of this act unless he shall have been appointed by and with the advice and consent of the Senate.'"

V. Stat. at Large, 624.

* * * "On the 16th of August, 1849, Joseph Balestier received from President Taylor the appointment of '*special agent* of the United States' to Cochin, China, and other parts of southeastern Asia; out of which commission came our treaty with Borneo. * * *

"On the 3d of May, 1838, Nathaniel Miles was commissioned by President Van Buren as 'special agent of the United States' to the Kingdom of Sardinia, and as such negotiated our treaty with Sardinia.

"On the 28th of March, 1846, A. Dudley Mann was appointed by President Polk 'special agent of the United States to treat with sundry States of Germany,' and as such agent he negotiated the treaty with Hanover."

7 Atty. Gen. Op., 205.

To this list Mr. Cushing might have added the following: In 1850 the same A. Dudley Mann was sent as "special agent of the United States on a mission to the Swiss Confederation," and on behalf of the United States negotiated a treaty between this Government and that Confederation, which treaty was duly ratified and is still in full force.

U. S. Rev. Sts. for D. C., p. 748.

"The President of the United States may appoint a diplomatic agent to reside in the city of Yedo." Treaty with Japan.

Do., Art. 1, p. 450.

In our treaty with the Orange free State our negotiator is described as follows:

"For this purpose they have appointed for their plenipotentiaries, to wit: The President of the United States, Willard W. Edgecombe, special agent of the United States, and their consul at the Cape of Good Hope."

Do., p. 580.

But to return to Mr. Cushing's opinion:

"In regard to the possible varieties of diplomatic agents, we have in the Constitution 'ambassadors' and 'public ministers,' which includes all the contents of the class.

"That construction of the phrase in the clause of the Constitution defining the power of appointments is confirmed by the use of the same words in a subsequent clause, which empowers the President to 'receive ambassadors and other public ministers,' meaning, of course, all possible diplomatic agents which any foreign power may accredit to the United States; as also where the same expressions are employed in the clause defining the jurisdiction of the courts of the United States.

"In the acts of Congress we have mention of ministers plenipotentiary, envoys extraordinary, special ministers, commissioners, ministers resident, chargés d'affaires, secretaries of a plenipotentiary, and secretaries of embassy and

legation; and also '*agents*' *so-called, who were, in fact, ministers with special powers.* But these statute designations are not exclusive. * *

"In respect to their functions as related to their titles, the diplomatic agents of the United States spoken of in the acts of Congress are not reducible to any uniform rule of designation and consequent rank. * * *

"In truth, neither the power nor the functions of a public minister with us have the least regard to his title. That and the salary are questions of dignity only. None of our ministers have, in strictness, *full* powers, because they are confined by their instructions, and still more by the limited powers of the Government, from which ensues the necessity of limited powers to each one of its functionaries. Within the range of constitutional authority they have 'such powers as the President sees fit to grant, and no more. On the other hand, whatever their title of dignity, and whatever the salary allowed to support that more or less of dignity, they are, each and all, in virtue of their commissions under the great seal of the United States, the unquestionable representatives *pro tanto* of the sovereignty of the United Sates.'" (P. 211.)

Referring to the act of 1855, Mr. Cushing says: "It could not constitutionally say, and does not pretend to say, that if, under any contingencies of political relation, it should become not possible, nor honorable, nor expedient, for the United States to have such a minister of the highest rank in Great Britain, or in Sweden, and still the public honor and interest required the legation to be maintained, that it might not be done by means of a minister of secondary rank, a minister resident, a chargé d'affaires, or even an agent without title." (p. 220.)

There certainly was no question in Mr. Cushing's mind that the term "*other public ministers*" used in the Constitution included the *agent* as truly as it did the minister resident, or any other class.

was signed by the representative of the Netherlands, as follows:

"D. DEGRAEFF VON POLSBROEK,
"H. N. M.'s Consul General and
"*Political Agent* in Japan."

U. S. Rev. Sts. for D. C., p. 459.

These authorities are supplemented by the admissions of the United States District Attorney for the District of Columbia, and of Mr. R. Ross Perry, his special and able assistant in this cause, as fully appears from the following, quoted from their brief filed in the court below:

"The term 'Political Agent' is used by the following writers as denoting a person clothed with diplomatic powers and privileges:

"Moreuil, 'Manuel des Agents Consulaires;'
"De Cussy, 'Manuel Lexique de Diplomates;'
"De Garden, 'Traite complet de Diplomatie.'

"We have thus seen that the name 'Political Agent' does not exclude the defendant from the body of public ministers if his credentials accredit him with political or diplomatic functions. The question, then, recurs to the letter of credence. This, it will be observed, is addressed to the Secretary of State, under the style of Minister of Foreign Affairs, and is signed by the President and Chancellor of the Swiss Confederation. The copy furnished by the Department of State does not appear to be sealed, but this is a mere matter of form. If the Government of the United States deemed this omission of importance it could have refused to receive and recognize the defendant under this letter of credence; but as it did receive and recognize him, the recognition is to be construed to be as broad and liberal as the letter of credence. As matter of fact, letters of credence, or diplomas as they are called in diplomatic language, are never under seal. They are in form private letters, from power to power.'

"This letter is addressed to the Minister of Foreign Affairs, and not to the President. But the letters of credence of *Chargés d'Affaires* are always so addressed. This circumstance would merely signify that the Swiss Confederation intended the defendant to occupy a subordinate position among public ministers; that he was not a minister of the highest grade.

"When we examine that part of the credentials which defines the functions of the Agent which it creates, we find that he is to be the Agent of the Swiss government to the United States. The Secretary of State is asked to give faith and credence to all that he shall do and say in the name of the Swiss government. And the purposes for which he is appointed are purely political and diplomatic, to wit: to make closer the ties of friendship, and to develop more and more the good relations existing between the two governments. These functions are absolutely distinct from those of a consul. There is not even a hint in them of any commercial duties; these, indeed, were abundantly provided for by the defendant's commission as Consul General. The additional duty imposed upon him as Political Agent was to represent the Swiss Republic, and faith was to be attached to everything that he might do in its name.

* * * * *

"It is true that the Government of the United States on one occasion refused to continue to allow the defendant to import certain merchandise for his own use free of duty."

"Secretary Fish, in his letter, says: 'This exemption is allowable only to representatives having the rank of either Ambassador, Envoy Extraordinary and Minister Plenipotentiary, Minister Resident, and Chargé d' Affaires.' But this action on the part of Secretary Fish, in the first place, cannot affect the *status* given to the defendant by his letter of credence and his reception, according to the tenor thereof, as settled by the rules of International Law; and in the second place, this letter, in effect, recognizes the defendant as a diplomatic agent, but determines that his rank is not of

that grade which would entitle him to the privilege claimed."

"It would seem that, under the letter of credence above quoted, with its corresponding reception by this Government, the defendant was recognized as a diplomatic officer, and is therefore entitled to the immunities granted by the rules of International Law to a public minister."

A PUBLIC MINISTER IS EXEMPT FROM LOCAL JURISDICTION, BOTH CIVIL AND CRIMINAL.

"From the moment a public minister enters the territory of the State to which he is sent, during the time of his residence and until he leaves the country, he is entitled to an entire exemption from the local jurisdiction, both civil and criminal."

Whea., sec. 224.

"The act of sending the minister on the one hand, and of receiving him on the other, amounts to a tacit compact between the two States that he shall be subject only to the authority of his own nation."

Do.

WAIVER OF PRIVILEGE.

While counsel for the United States thus fairly admitted in the court below that the petitioner was a diplomatic officer and, "therefore, entitled to the immunities granted by the rules of international law to a public minister," they claimed that he had waived his rights to those immunities by remaining in this country after his diplomatic functions had ceased.

Assuming that the counsel for the Government will, in this court, make the same claim, we say:

First. There is nothing in the record to show that petitioner's political agency has been determined. But, assuming that it has, the indictment when found and filed was an

absolute nullity, because the alleged offences, if any, by fiction of law, were committed, not in the United States, but in Switzerland, thus rendering it impossible for a United States court to acquire jurisdiction.

Second. The privileges of a public minister are not exclusively personal. They are equally the privileges of the appointing government, and cannot be waived.

The demurrer admits that the alleged offences, if any, were committed while the petitioner was such Political Agent, and that the indictment was found and filed while he was such Agent; and counsel for the Government admit, in substance, that said agency gave the petitioner immunity against said indictment being found or filed. If so, then the indictment was still-born, and is as dead to-day as it was at its birth. The doctrine of the Sadducees applies with full force to dead indictments.

JURISDICTION IN THIS COURT TO AFFORD THE RELIEF ASKED BY PETITIONER.

Article III, Sec. 2, of the Constitution gives original jurisdiction to this court "in all cases affecting ambassadors, other public ministers and consuls."

Section 687 of the Revised Statutes gives to this court "exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers or their domestics or domestic servants as a court of law can have consistently with the law of nations."

The only conceivable jurisdiction that can be exercised by a court of law "*consistently with the law of nations*" of such suits or proceedings is the determination of the question whether the defendant is or is not an ambassador or other public minister. Courts take judicial notice of the appointment of foreign ministers by their own governments, but not of the appointment of public ministers to their own governments. Immunity applies to a public minister on his landing in any country foreign to the one he represents,

whether it be the one to which he is accredited or one through which he passes in journeying to or from the country to which he is accredited.

Courts of justice have no judicial knowledge of their character, but must in certain cases determine the question on the plea of the minister. Under the statute quoted the filing of the plea in any inferior court at once ousts that court of jurisdiction of the case till this court shall have decided that the plea is false in fact.

The petitioner has filed such a plea, and has brought the case here for judicial decision as to whether said plea is true or false. If true, he is entitled to be discharged by this court; if false, the duty of the court is to so decide, and to send the record back to the court below with a *procedendo*.

The demurrer admits the truth of the plea, and the counsel for the United States rests solely on the form of the plea and on their alleged waiver.

The demurrer was general, and a plea cannot be held bad for form on such a demurrer, and we have shown the impossibility of any waiver in the case.

We therefore respectfully submit that the petitioner is entitled to have the writ of *certiorari* issued.

BENJ. F. BUTLER,
O. D. BARRETT,
Counsel for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

IN RE JOHN HITZ,
PETITION FOR WRIT OF CERTIORARI. } No. 12. Original.

Brief on behalf of the United States.

R. ROSS PERRY,
Special Counsel for U. S.
A. S. WORTHINGTON,
U. S. Dist. Att'y, D. C.

R. O. POLKINHORN, PRINTER, WASHINGTON, D. C.

In the Supreme Court of the District of Columbia.

CRIMINAL TERM.

THE UNITED STATES,
vs.
JOHN HITZ, *et al.*

The defendant, John Hitz, was indicted in several forms in the Criminal Term of the Supreme Court of the District of Columbia, for certain criminal violations of the laws of the United States concerning National Banks, to wit: for embezzlement, forgery, &c.

To one of these indictments he filed the following plea, which, by agreement of counsel, was to be regarded as filed to each of the said indictments; and it was further agreed by counsel that the judgment of the court upon said plea should apply to all of the said indictments.

Plea of the defendant, John Hitz:

"And now comes said John Hitz in his own proper person, and having heard said indictment read to him, says that this court ought not to take cognizance of the supposed offenses in said indictment specified; because, protesting that he is not guilty of the same, nevertheless said Hitz for plea to said indictment and to each and every count thereof says that said John Hitz was born a Swiss citizen, under the jurisdiction of the Swiss Republic, to wit, at Davos, canton of Gri-

son, and that before and at the time of the supposed commission of the alleged offenses set out in said indictment, and to the time of the finding and filing thereof, he resided in said District of Columbia, holding the places or positions of Consul General and of Political Agent of the Swiss Republic, having been, long before the time of the supposed commission of said offenses alleged in said indictment, by the Swiss Republic appointed in due form and accredited the Consul General and the Political Agent for said Republic in the United States of America, and then and there was received, recognized and held by the Government of the United States as such Consul General and such Political Agent.

"And that said John Hitz continued to be such Consul General and such Political Agent, and continued to be recognized as such Consul General and such Political Agent by the Government of the United States, until after the finding and filing in court of said indictment, all of which said John Hitz is ready to verify. Wherefore he prays judgment if the said court now here will or ought to take cognizance of the indictment aforesaid, and that by the court here he be dismissed without day.

"JOHN HITZ.

"I, John Hitz, make oath that the plea by me above subscribed is true in substance and in fact.

"JOHN HITZ."

To this plea the United States filed the following special demurrer:

"And now comes the United States, by Mr. R. Ross Perry, its special attorney, and says that the substituted plea of the defendant, John Hitz, filed on the 3rd day of June, A. D. 1882, to the indictment in the above entitled cause, is bad in substance.

"R. ROSS PERRY,

"*Special Attorney for the United States.*

"NOTE.—It will be argued by counsel for the United States, in support of the above demurrer, that the

plea to which it is interposed is double in this, that it contains averments as to three separate matters of fact, to wit: That the defendant, John Hitz, is an alien; that he was Consul General of the Swiss Confederation at the time of the commission of the alleged offenses, and of the finding of the said indictment, and that he was Political Agent of the said Confederation at the said times; to each of which matters the United States is entitled to reply separately.

"R. Ross Perry,
"*Special Attorney for the United States.*"

This demurrer is special and for matter of form, inasmuch as the note thereto, which is a part thereof, specifies certain objections of duplicity as applicable thereto.

Chitty on Pleading, vol. 1, p. 654;
Stephen on Pleading, pp. 45, 142.

This special demurrer asserted that the defendant's plea offended the rule of pleading with respect to duplicity. In it were averred three separate matters of fact, each of which might have a determining influence upon the defendant's liability, to wit:

A. Averment of alienage.

B. Averment of *status* as Consul General of the Swiss Republic.

C. Averment of *status* as political agent of the Swiss Republic.

A. Section 5146 of the Revised Statutes requires that the directors of National Banks shall be citizens of the United States. The first division of the defendant's plea, in which alienage is averred, is therefore matter of distinct defense, and should have been

pleaded separately, in order that the United States might have replied thereto, if so advised.

B. The averment as to the defendant's *status* as Consul General should have been made by separate plea; for manifestly any immunity which might result therefrom has no connection with the defense of alienage or of diplomatic *status*.

C. The defense of diplomatic *status*, which after all is the only substantial matter of defense, is also absolutely distinct from the other matters of defense. True, it may be, that doubts exist whether a citizen can be a representative of a foreign power, and to that extent the averment of alienage is matter only of introduction or inducement; but in reply it may be said that the averment of diplomatic function is sufficient, and would, *prima facie*, or without contradictory suggestion, exclude citizenship; and, secondly, where the averment of alienage might be matter of distinct defense, the rules of pleading which tend to produce singleness of issue would demand a separate averment of that matter of defense.

It is submitted, therefore, that upon the face of the defendant's plea are three separate and distinct averments of exemption from responsibility. No matter whether these are valid defenses or not, whether, when singly averred, they would be demurrable or not, the Government is entitled, of right, to reply separately to those averments of fact.

Stephen on Pleading, p. 251;
Chitty on Pleading, Vol. 1, p. 330.

If, however, the court should be of opinion that the defendant's plea is not liable to objection on the ground of duplicity, and is proper in form, and therefore not open to special demurrer, yet it is well settled that upon argument objections based upon the substance of the plea may be considered. It remains, therefore, to examine the force of the several objections which are urged to the jurisdiction of this court in the said plea, and these will be considered in the order in which they are pleaded.

I.

The averment with respect to the defendant's *status* as an alien is simply that he was born in Switzerland, and that he was commissioned as Consul General and accredited as Political Agent by the Swiss Republic to the Government of the United States, and received by that Government in those capacities.

The plea does not negative the idea of his naturalization as a citizen of the United States, nor does it aver that he continued a Swiss citizen, nor does it exclude the operation of that rule of international law which would make him an American citizen upon the removal of his father to the United States with him as an infant, the subsequent naturalization of the father, the attaining by the defendant of his majority in the United States, and repeated acts on his part, including an active occupation in business, such as only a citizen of the United States could engage in, as indicating an election on his part to claim the *status* of an American citizen and a fixed belief on his part

that he was such citizen. For these reasons, it is important that the special demurrer should be sustained in order that, if his *status* as an alien should become a substantial matter of inquiry, the fact of alien *vel non* may be examined in the light of the above suggestions and definitely fixed. As the plea stands, however, it is clear that so much thereof as avers immunity from the jurisdiction of this court, upon the ground of *status* as an alien, is bad in substance, and so much of the plea is liable to general demurrer.

Authority need not be quoted to establish the proposition that, under the law of nations, aliens are subject to the law of the place of domicile for criminal violations of that law, as also they are liable to be sued for demands of a civil nature, and are privileged in turn to sue for such demands. The defendant can, therefore, claim no exemption from the jurisdiction of this court on the ground that he is an alien, even conceding his averment of alienage to be true.

II.

The next averment of the plea is that the defendant was, at the time specified in the plea (to wit, the date of the commission of the alleged offences and of the finding of the said indictment), duly commissioned as Consul General of the Swiss Republic, and that he had been received and recognized in that capacity by the Government of the United States.

The preceding averment of alienage can not have, for the purposes of this inquiry, any effect upon the *status* as consul or Consul-General, the one grade be-

ing practically equivalent to the other. It is true that Vattel asserts that a consul must not be the subject of the State where he resides, but this is not the only instance where Vattel differs from the great preponderance of authority among writers of recognized standing upon international law with respect to the law incident to the position of consul. It is well settled, both in authority and practice, that a consul can be a citizen of the State where he resides. This is a matter of concern only to the power appointing him. If that power is content, there is nothing in the law of nations which prevents the appointment. Our own Government is represented abroad by many aliens, many of whom are subjects of the State in which they represent the interests of our people.

It remains then to consider the *status* of the defendant as Swiss Consul General apart from any question of his citizenship.

Vattel asserts (Book II, C. 11.) that the functions of a consul "seem to require that the consul should be independent of the ordinary criminal justice of the place where he resides, so as not to be molested or imprisoned unless he himself violate the law of nations by some enormous crime." Again he says, (*ibidem*) "if he commits any crime, the respect due to his master requires that he should be sent home to be punished." He makes these assertions advisedly and in contradiction, explicitly, of Wicquefort. He, however, adds: "But the surest way is expressly to settle all these matters, as far as practicable, by

the commercial treaty." As will be hereafter seen, this has been done by the United States and Switzerland. On the general proposition however, and quite independent of treaty, the great preponderance of international authority is opposed to Vattel.

Wheaton says (Part III, Ch, I., § 22) "in civil and criminal cases consuls are subject to the local law in the same manner with other foreign residents owing a temporary allegiance to the State." It is undeniable that they do not enjoy the privileges of *extra-territoriality* according to the rules of law received in the United States.

Clark vs. *Cretico*, 1 Taunton, 106;
The Anne, 3 Wheaton, 446;
United States vs. *Ravara*, 2 Dallas, 297;
Viveash vs. *Becker*, 3 Maule & Sel., 284;
Barbuit's case, Cases Temp. Talbot, 281;
Comm vs. *Korsloff*, 5 Serg. & Rawle, 545;
Durand vs. *Hallack*, 1 Miles, 46;
Davis vs. *Packard*, 7 Peters, 276;
State vs. *De la Font*, 2 Nott & McCord, 217;
Mannhard vs. *Soddersstrom*, 1 Binney, 138;
Hall vs. *Young*, 3 Pick., 80;
Sartori vs. *Hamilton*, 1 Green R., 107.

The principal authorities upon international law who differ from Vattel, are:

Wicquefort on Ambassadors, Liv. I., Ch 5;
Bynkershoeck de F. Legat, Caput X.;
Wildman's Institutes, Vol. 1. p. 130;
Flynn's British Consuls, Ch. 5;

De Cussy, Reglement's Consulaires, § 6;
Moreuil, Agent's Consulaires, p. 348;
Borel, des Consuls, Ch. 3;
Foelix livre 11, litre 2, ch. 2, § 4;
Dalloz, Dic. de Juris, livre "Agents Diplomatiques," No. 35;
Masse Droit Commercial tome 1, Nos. 438, 439;
Opinions of Attys. General, Vol. VII., p. 22, Cushing,

So far, then, as the question depends upon rules of international law, the great preponderance of authority is that the defendant's *status* as Consul General of the Swiss Republic affords him no immunity from the jurisdiction of this court.

It is not necessary, however, to resort to these rules in this case, for the United States and Switzerland have definitely determined this whole matter by treaty. In the convention with the Swiss Confederation, concluded at Berne Nov. 25, 1850, it is provided in Article VII., as follows: "In case of offense against the laws by a consul or vice consul, the Government to which he is commissioned may, according to circumstances, withdraw his exequatur, send him away from the country, or have him punished in accordance with the laws, assigning to the other government its reason for so doing."

U. S. Statutes at Large, Treaties, &c., p. 750.

Whether, then, the defendant Hitz be, or be not, an alien, he is, according to the rules of international law, and by express provision of treaty, subject to

the laws of the municipal tribunals for criminal behavior.

There remains, however, to consider an important question of jurisdiction arising under the Constitution and laws of the United States from the *status* of the defendant as consul.

The Constitution of the United States, Article III., § 2, provides as follows: "In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction; in all the other cases before mentioned the Supreme Court shall have appellate jurisdiction."

What is commonly called the Judiciary Act, approved Sept. 24, 1789, C. 20, S. 13 (Statutes at Large, Vol. 1, p. 80), now included in Section 687 of the Revised Statutes, provides, among other things, as follows: "And it (the Supreme Court) shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations, and original but not exclusive jurisdiction of all suits brought by ambassadors or other public ministers, or in which a consul or vice consul is a party."

The Eleventh Section of the same Act provides that "the Circuit Courts shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where this Act otherwise provides, and concurrent jurisdiction with the District Courts of the crimes and offenses cogni-

zable therein." There are other sections of this Act *in pari materia* which need not be quoted for the purpose of this argument.

In the case of the *United States* vs. *Ravara*, 2 Dallas, 297, which was an indictment of the defendant, consul of Genoa, for sending threatening letters, found in the Circuit Court for the Pennsylvania District, the question of jurisdiction was explicitly made. Upon argument, Wilson & Peters, J. J., sustained the jurisdiction of the Circuit Court, and Iredell, J., dissented, holding that the constitutional provision gave original and exclusive jurisdiction to the Supreme Court. This case was afterwards argued before Jay, Ch. J., and Peters, J., and the conviction was sustained. But the point of jurisdiction does not seem to have been mooted. The case of the *United States* vs. *Ortega*, 11 Wheaton, 467, was an indictment against a private citizen for assaulting a foreign minister, and the Court (Washington J.) unanimously held that it was not a case "affecting ambassadors, other public ministers and consuls." The court avoided the constitutional question as to the exclusive jurisdiction of the Supreme Courts in cases where, by the constitution, original jurisdiction was conferred upon it. An elaborate note to this case sets forth certain propositions, among which is one which asserts as positive law, that which the Supreme Court had in the case itself refused to pass upon.

In the case of *Davis* vs. *Packard*, VII Peters, 276, the point under discussion was not raised or even adverted to in the argument or the opinion of the court. Parties on both sides were content to rest in

the conviction that the Circuit Courts had jurisdiction if any Court had, and in that conviction the Supreme Court left them.

The Supreme Court has nowhere passed directly upon this question. But this Court has frequently entertained original jurisdiction of suits involving consuls.

Casey, Receiver, vs. *Galli*, 94 U. S., p. 673.

In one case only have counsel ascertained that a State court, upon a plea of privilege properly made, has entertained jurisdiction of a suit against a consul.

State vs. *De la Foat*, 2 Nott & McCord, 217.

The decision of the Circuit Court in the case of the *United States* vs. *Ravara* has been followed in the cases appended by Circuit Courts of the United States, to wit: by Betts J., in *St. Luke's Hospital* vs. *Barclay, et al.*, 3 Blatchford, 259; and by NELSON J., in the case of *Graham* vs. *Stucken*, 4 Blatchford 50; although he seems to have overlooked the case of Ravara, and decides the point upon argument rather than authority. By far, however, the most important decision upon this point is that of the late Chief Justice TANEY, in the case of *Gittings* vs. *Crawford*, Taney's Dec. 1, where the whole question is reviewed *ab initio*, and exhaustively considered both upon reason and authority, and the conclusion of this eminent jurist is, that the constitutional grant of jurisdiction is original but not exclusive, and that the provisions of the Judiciary Act above quoted are valid and operative.

On the other hand, the Supreme Court, in the case of *Marbury* and *Madison*, 1 Cranch, 137, through MARSHALL Ch. J., in general terms pronounced certain *dicta* in reference to this clause of the Constitution, among which was the following: Congress have not power to give original jurisdiction to the Supreme Court in other cases than those described in the Constitution.

Again, in *Cohens* vs. *State of Virginia*, 6 Wheaton, 378, the construction of this same clause of the Constitution was under consideration, and, although the *dicta* of *Marbury* and *Madison* were in some respects modified, yet it is clearly intimated that the original jurisdiction given by the Constitution to the Supreme Court is exclusive, and that Congress cannot confer original jurisdiction upon an inferior court in those cases where the Constitution gives the Supreme Court original jurisdiction.

And again, in the case of *The Bank of the United States* vs. *Osborn*, 9 Wheaton, 820, the same opinion is expressed by the Chief Justice.

In the case of the *Commonwealth* vs. *Korsloff*, 5 Sergeant & Rawle, 545, Chief Justice Tilghman, in pronouncing his opinion as to the want of jurisdiction in the State courts in an indictment against a Consul General, refers approvingly to the case of *Marbury* and *Madison*, and pronounces it strongly as his opinion that the jurisdiction of the Supreme Court is exclusive.

In the *State of Georgia* vs. *Brailsford*, 2 Dallas, 402, it seems from the opinion of Iredell J., that so

early as 1792 he refused to permit that State to sue in the Circuit Court for the District of Georgia, holding that the Supreme Court had exclusive jurisdiction.

In the case of *Den ex. dem. Gale* vs. *Babcock*, 4 Washington's C. C. R., p. 199, Washington J. and Pennington District Judge, the Circuit Court for the then Third Circuit (1822) held, as Iredell had done, that the Circuit Courts had no jurisdiction where a State was a party.

The same decision has been made in the United States Circuit Court (North Carolina) in the case of *State of North Carolina* vs. *University*, 5 Nat'l B R. p. 466.

The latest, and perhaps the strongest, decision upon this subject was made in the case of *Wisconsin* vs. *Duluth*, 5 Dillon, 406, when Mr. Justice MILLER, sitting as a Circuit Judge, held the jurisdiction of the Supreme Court exclusive, where by the Constitution it is original.

Let us now briefly review the arguments urged on either side of this disputed question in the authorities above quoted.

In the case of *United States* vs. *Ravara*, the only reason assigned for the decision of the majority of the court was as follows (per Wilson J.): "I am of opinion that, although the Constitution vests in the Supreme Court an original jurisdiction, in cases like the present, it does not preclude the Legislature from exercising the power of vesting a concurrent jurisdiction in such inferior courts as might by law be established."

In the case of St. Luke's Hospital and Barclay, Betts J. and NELSON J. overruled a plea that the defendant, a consul, ought to be sued in the Supreme Court or in some District Court of the United States, but no reasons are assigned for their decision. However, in the case of *Graham and Stucken*, Justice NELSON, before whom the same question was again raised gave, at some length, his reasons for the opinion which he then held. These reasons are as follows: 1st. The framers of the Judiciary Act of 1789 understood the Constitution as admitting jurisdiction over foreign consuls to be vested in other Federal Courts besides the Supreme Court, as is evident from the provisions of that act. 2d. Because the same act made distinctions with respect to certain cases in which a State should be a party, and in some of such cases provided that the Supreme Court should have original but not exclusive jurisdiction, and that the argument of unconstitutionality would thus affect this clause also. 3d. Because the framers of this act, many of whom were eminent members of the convention that formed the Constitution, should be presumed to have understood the full force of the language which was used both in the Constitution and in the Judiciary Act, and they further provided in that act that the District Courts of the United States shall have jurisdiction, exclusive of the courts of the States, of all suits against consuls, vice consuls, &c. The Justice concludes, "In the face of all this legislative interpretation by the fathers of the Constitution, and all this acquiescence therein since 1789, I cannot say that the jurisdiction in this case is exclusively in the Supreme

Court, but am satisfied that it may be conferred upon the inferior tribunals of the Federal judiciary. Being pressed for time, I have stated simply the grounds of this conclusion, without giving more at large the reasons in support of it."

It is to be hoped that the reasons reserved were more weighty than those assigned, for certainly if the Judiciary Act infringed upon the Constitution in one respect, it might easily so infringe in several; and, again, the interpreters of the Constitution and of the Judiciary Act are not the fathers of either or both; the judiciary of the United States, not its legislators, are the interpretors of the Constitution and the laws.

In the case of Gittings and Crawford, the late Chief Justice Taney has pronounced the only opinion which is really worthy of the importance of the question. He carefully reviews the decisions of the Supreme Court in Marbury and Madison, Cohens and Virginia, Osborne and The Bank, and, referring to certain silences of the Court in United States and Ortega, and Davis and Packard, decides that, independent of *dicta*, the question is technically *res integra* in the Supreme Court; the Chief Justice proceeds to say that, without regard to authority, he must be strongly convinced in his own mind before he would pronounce any provision of the Judiciary Act unconstitutional, for the framers of it comprised many men who helped to frame the Constitution and who must have understood its provisions. Again, he urges that there are no express words of exclusion in

the clause which confers original jurisdiction, in the cases mentioned, upon the Supreme Court. Why should they be implied? Again, he argues that because State courts have jurisdiction in cases wherein is drawn in question the Constitution and laws of the United States, subject to the revision of the Supreme Court, although the grant of judicial power is made to extend to all cases arising under the Constitution and the laws of the United States, &c., therefore the grant of power to the courts of the United States is not to be held exclusive in any case unless it is so expressly provided. Again, he urges that, under the decision of *Cohens* and *Virginia*, the Supreme Court had appellate jurisdiction in certain cases where by the Constitution it had original jurisdiction; therefore the grant of original jurisdiction was not exclusive. Again, he says, that no reasons of public policy in the case of a subordinate officer like a consul require the Supreme Court to have exclusive jurisdiction, and that many considerations *ab inconvenienti* forbid it. The true rule he pronounces to be this:

> "The grant of jurisdiction over a certain subject-matter to one court does of itself imply that that jurisdiction is to be exclusive. In the clause in question there are nothing but mere affirmative words of grant, and none that import a design to exclude the subordinate jurisdiction of other courts of the United States on the same subject-matter."

This is the extent of authority and reason on this side of the question, holding that the jurisdiction is not exclusive.

Opposed to this rule is the following reasoning: Justice IREDELL, so early as the year 1792, decided that "the Circuit Court could not with propriety sustain an application made by the State of Geórgia, because, whenever a State is a party, the Supreme Court has exclusive jurisdiction of the suit." 2 Dallas, 406.

As the provision of the Constitution respecting suits wherein a State shall be a party, and all cases affecting consuls, &c., is one and the same, the authority and reasoning are in direct point.

The same Justice, in United States and Ravara, dissenting, says:

> "It appears to me that, for obvious reasons of public policy, the Constitution intended to vest an exclusive jurisdiction in the Supreme Court, upon all questions relating to the public agents of foreign nations. Besides, the context of the judiciary article of the Constitution seems fairly to justify the interpretation that the word *original* means *exclusive* jurisdiction."

In Marbury and Madison, MARSHALL, C. J., says:

> "It has been insisted at the bar that, as the original grant of jurisdiction to the supreme and inferior courts is general, and the clause assigning original jurisdiction to the Supreme Court contains no negative or restrictive words, the power remains to the Legislature to assign original jurisdiction to that court in other cases than those specified in the article which has been recited: provided, those cases belong to the judicial power of the United States. If it had been intended to leave in the discretion of the Legislature to apportion the judicial power between the supreme and the inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power and the tribunals in which it should be vested. The sub-

> sequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If Congress remains at liberty to give this court appellate jurisdiction, where the Constitution has declared their jurisdiction shall be original, and original jurisdiction where the Constitution has declared it shall be appellate, the distribution of jurisdiction, made in the Constitution, is form without substance. Affirmative words are often, in their operation, negative of other objects than those affirmed; and, in this case, a negative or exclusive sense must be given to them, or they have no operation at all. * * * The plain import of the words seems to be that in one class of cases its jurisdiction is original and not appellate; in the other, it is appellate and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning."

In *Cohens* and *Virginia*, the Supreme Court decided, through Marshall, C. J., that where the subject-matter of the controversy was one which might be taken cognizance of by an inferior Federal or a State tribunal, the fact that one of the parties to the controversy was a State, over which, as a party, the Supreme Court had original jurisdiction, did not prevent the inferior court from exercising original, nor the Supreme Court appellate, jurisdiction in the matter; nor did it conflict with the grant of original jurisdiction interpreted as exclusive, for wherever the jurisdiction was founded on the character of the parties, the jurisdiction was still exclusive, but where it was founded on the character of the case, there it was appellate; and the court, although recalling some of the *dicta* in *Marbury* and *Madison*, strongly intimate that the clause granting original jurisdiction

to the Supreme Court was so far exclusive that Congress could not grant original jurisdiction, in the cases enumerated, to an inferior tribunal of the United States.

Again, in *Osborne* and *The Bank*, decided 21 years after *Marbury* and *Madison*, the same Chief Justice, upon the same reasoning, distinctly asserts that the original jurisdiction of the Supreme Court is also EXCLUSIVE.

As has been already stated, the reasoning in *Marbury* and *Madison* was quoted with approval by Chief Justice Tilghman, of Pennsylvania, in *Commonwealth* and *Korsloff*. It was also followed by Justice Washington, in 1822, in *Gale* and *Babcock*, and in 1870, by Justice Brooks, in *North Carolina* and *The Bank*.

Finally, Mr. Justice MILLER, so late as the year 1872, in *Wisconsin* and *Duluth*, held as follows:

> "As that court (Supreme) has original jurisdiction of such suits, it would seem that it cannot have, in any such case, appellate jurisdiction. The section in the Constitution which confers it as original, is followed by the declaration that in all *other* cases before mentioned the Supreme Court shall have appellate jurisdiction. Did the framers of the Constitution intend to give to the Supreme Court both an original and appellate jurisdiction in the same class of cases founded in the *character of the parties?* Or did it by this clause intend to define the cases in which it should have original, and that which should have appellate jurisdiction, and to distinguish and separate them from each other? The natural import of the language used, defining specially the cases in which it has original jurisdiction, and declaring that in all others its jurisdiction shall be appellate, favors very strongly the idea that in those classes of cases of which it has original cognizance, it can have no appellate jurisdiction."

I have given thus somewhat in detail both the decisions and the reasons upon which they professed to be based, on both sides of this disputed question, so far as they have come to my knowledge after diligent search. It is for the court to determine upon which side lies the preponderance of reason or authority, or both. The rule "*contemporanea expositio est fortissima in lege*" does not here afford much aid, for either side can claim aid therefrom. In so far as the act of 1789 is to be claimed as a contemporaneous exposition, it must be recollected that "the power of expounding the law, which includes the great and responsible duty of deciding whether the legislative assemblies (National) State and municipal, have transcended in their past action the limits of their powers as defined by the Constitution and the laws—this belongs to the judiciary alone."

Sedgwick on Statutory and Constitutional Law, p. 253,

So far as judicial contemporaneous construction is concerned, on the one side is *The United States* vs. *Ravara*, and on the other *Brailsford* and *Georgia*, and *Marbury* and *Madison*.

Again, with respect to the *argumentum ab inconvenienti*, there are two weighty reasons, one general and the other especially applicable to the case, why the rule of non-exclusive jurisdiction should prevail, first, because it is beneath the dignity of the Supreme Court of the United States, and wasteful of its time, that it should be compelled to take exclusive cognizance of all disputes, even the most petty, where

consuls are concerned; second, because the Supreme Court has no adequate legal machinery for the empaneling of a grand jury for inquiry into crimes alleged to have been committed by consuls in the District of Columbia. In answer to these objections, it may be said, first, that if the framers of the Constitution saw fit to give the Supreme Court this jurisdiction, it can not be beneath its dignity to entertain it, and to bestow so much of its time as may be required for the purpose; second, that the defective machinery may argue the necessity of legal amendment or extension, but cannot avoid a right construction of the Constitution. Again, the rule is that where a practical construction has early and generally obtained, the *argumentum ab inconvenienti* will prevail against an attempt to overthrow that construction. Where, however, there have been different constructions, this rule becomes subordinate, and is only to be resorted to where the ordinary rules of construction fail.

There is one other consideration which has seemed to me to be controlling in this case of the jurisdiction of the Supreme Court of the district of Columbia, but as it is equally applicable to the status claimed as a diplomat, I will consider it in that connection.

III.

The third ground of immunity suggested by the defendant's plea is that, at the time of the commission of the alleged offenses and the finding of the said indictments, he was Political Agent of the Swiss Republic, appointed and accredited as such in due form,

and received and recognized as such by the Government of the United States.

It has seemed important to counsel that the exact position and powers held and possessed by the defendant as such Political Agent should be definitely ascertained. The plea should have set out the credentials of the defendant and averred that he was received by the United States according to the tenor of the letter of credence. As the plea did not do this, it was demurred to specially for error of form in this respect as well as for duplicity generally. This letter, at the suggestion of the court and with the consent of counsel, is to be considered as filed in support of the plea, and is as follows:

(TRANSLATION.)

"BERNE, *February* 28, 1868.

"*To his Excellency*, MR. WM. H. SEWARD, *Minister, Secretary of State for Foreign Affairs of the United States of America, etc., etc., at Washington:*

"Animated with the desire of always making closer the ties of friendship, and of developing more and more the good relations happily existing between Switzerland and the United States of America, the Federal Council, wishing at the same time to give a signal token of its esteem to the Government of the Union, has conferred to-day upon Mr. John Hitz its Consel General, at Washington, the title and rank of Political Agent of the Swiss Confederation at the seat of Government of the United States of America.

"In having the honor of informing Mr. William H. Seward, Minister Secretary of State of Foreign Affairs of the United States of America of this fact, the Federal Council begs his Excellency to be pleased to recognize Mr. John Hitz in his said capacity, and to give faith and credit to whatever he shall bring to the notice of his Excellency in the name of the Swiss Government,

especially when he shall be the organ of the sentiments of friendship and of the lively sympathy which it professes for the Government of the American Union and its institutions.

"The Federal Council eagerly avails itself of this occasion to offer to his Excellency, Mr. William H. Seward, the assurance of its distinguished consideration.

"In the name of the Swiss Federal Council—

President of the Confederation:

(Signed) "DUBS.

"The Chancellor of the Confederation:

(Signed) "SCHIESS."

Accordingly, this demurrer is to be considered in the light of the above letter of credence. Something will be said hereafter with respect to the usual form of a letter of credence, and the proper official to whom it should be addressed.

First, as to the name or title of "Political Agent." This is not included among the ordinary titles of diplomatic officers. Vattel, however, speaks of agents as follows (Book IV., Ch. 6, § 75): "Formerly agents were a kind of public ministers; but in the present increase and profusion of titles, this is given to persons simply appointed by princes to transact their private affairs, and they not unfrequently are subjects of the country where they reside. They are not public ministers, and consequently not under the protection of the law of nations. * * *If a prince sends an agent with credentials and on public business, the agent thenceforward becomes a public minister, his title making no difference in the case.*"

Wharton, while not recognizing the title *political agent* as representing any special *status* among diplo-

matic officers, applies to them all the generic designation of *diplomatic agents*.

Writers, generally, upon International Law fully establish this proposition.

> "Any person sent by a foreign power, clothed with diplomatic functions, and for political purposes, and accredited to that end, and received as such, becomes entitled to the immunities of a public minister."
>
> 2 Phillimore, 203;
> Merlin Rep., mot. "ministre public," Art. V.

Mr. Cushing, when Attorney-General, wrote an elaborate opinion upon this question, which confirms this proposition.

> Opinions of Attorneys-General, Vol. VII., p. 205.

The term "political agent" is used by the following writers as denoting a person clothed with diplomatic powers and privileges;

> Moreuil, "Manuel des Agents Consulaires;"
> De Cussy, "Manuel Lexique de Diplomates;"
> De Garden, "Traite complet de Diplomatie."

We have thus seen that the name "political agent" does not exclude the defendant from the body of public ministers, if his credentials accredit him with political or diplomatic functions. The question then recurs to the letter of credence. This, it will be observed, is addressed to the Secretary of State, under the style of minister of foreign affairs, and is signed by the President and Chancellor of the Swiss Confederation. The copy furnished by the Department of State does not appear to be sealed, but this is a mere

matter of form. If the Government of the United States deemed this omission of importance, it could have refused to receive and recognize the defendant under this letter of credence, but as it did receive and recognize him, the recognition is to be construed to be as broad and liberal as the letter of credence. As matter of fact letters of credence or diplomas as they are called in diplomatic language, are never under seal. They are in form private letters, from power to power. (See appended forms.)

This letter is addressed to the Minister of Foreign Affairs, and not to the President. But the letters of credence of *Charges d'affaires* are always so addressed. This circumstance would merely signify that the Swiss Confederation intended the defendant to occupy a subordinate position among public ministers; that he was not a minister of the highest grade.

When we examine that part of the credentials which defines the functions of the agent which it creates, we find that he is to be the agent of the Swiss Government to the United States. The Secretary of State is asked to give faith and credence to all that he shall do and say in the name of the Swiss Government. And the purposes for which he is appointed are purely political and diplomatic, to wit: to make closer the ties of friendship, and to develop more and more the good relations existing between the two governments. These functions are absolutely distinct from those of a consul. There is not even a hint in them of any commercial duties; these, indeed, were abundantly provided for by the defendant's

commission as Consul-General. The additional duty imposed upon him as Political Agent was to represent the Swiss Republic, and faith was to be attached to everything that he might do in its name.

It can make no difference that, in this case, the defendant was also consul.

In the case of *The Anne*, 3 Wheaton, 446, the Supreme Court says that it is undoubted that while a consul, as such, is not entitled to the protection of the law of nations as a public minister, yet political or diplomatic functions can be conferred upon him by his prince, and he then becomes *quoad hoc* entitled to all the privileges of a public minister.

It will be seen upon reference to §§ 1674, 1675, of the Revised Statutes of the United States, that the term *agent* is a recognized one among the existing diplomatic officers of the United States, and in the opinion of Mr. Cushing, before quoted, many instances are given in which they have discharged diplomatic duties in behalf of the United States.

It is an undisputed rule of International Law that if the power to whom a diplomatic agent is accredited receives him, it can only be in the quality attributed to him in his credentials.

Vattel Book IV., Ch. VI., § 76.

The question of citizenship in this connection is of doubtful importance, for, supposing the defendant to be a citizen of the United States, Wheaton declares the rule of law applicable to such a case to be as follows:

"If he is a citizen or subject of the country to which

> he is sent, and that country has not renounced its authority over him, he remains still subject to its jurisdiction. But it may be questioned whether his reception as a minister from another power, without any express reservation as to his previous allegiance, ought not to be considered as a renunciation of this claim, since such implies a tacit convention between the two States that he shall be entirely exempt from the local jurisdiction."
>
> Part III., Ch. I., § 15.

What is here stated as a query is determined as a settled rule in favor of a tacit renunciation, both by the reason of the matter, (for a minister ought not to be received absolutely and then limited or circumscribed in his power to act, save with the express understanding and consent of the power sending him,) and also by the following authorities:

Vattel Book IV., Ch. VIII., § 112;
Bynkershoeck, C. XI.

It is true that the Government of the United States on one occasion refused to continue to allow the defendant to import certain merchandise for his own use free of duty.

Secretary Fish, in his letter, says: "This exemption is allowable only to representatives having the rank of either Ambassador, Envoy Extraordinary and Minister Plenipotentiary, Minister Resident, and Charge d' Affaires." But this action on the part of Secretary Fish, in the first place, cannot affect the *status* given to the defendant by his letter of credence and his reception, according to the tenor thereof, as settled by the rules of International Law; and in the second place, this letter, in effect, recognizes the de-

fendant as a diplomatic agent, but determines that his rank is not of that grade which would entitle him to the privilege claimed.

It would seem that, under the letter of credence above quoted, with its corresponding reception by this government, the defendant was recognized as a diplomatic officer, and is therefore entitled to the immunities granted by the rules of International Law to a public minister.

IV.

There remains, however, for consideration a matter which does not appear upon the face of the pleadings, and which induced counsel to demur specially to the plea. It is averred in the plea that the defendant was a Political Agent of the Swiss Republic at the time of the offense committed and of indictment found. It is also true, however, that within a few days after the finding of the indictments he ceased to be such agent, and his place was filled by another. It is further true that for more than a year he has now remained voluntarily in this jurisdiction as citizen or alien, in what capacity is indifferent, transacting business, defending civil suits, voluntarily pleading to indictments, and acting in every respect as a private person. These facts could hardly have been replied to the plea in its present shape in connection with other matters of replication which the other branches of the plea demanded. For this reason, especially, counsel for the government were desirous of having the special demurrer sustained, and the defense of *diplomatic status* separately pleaded, in order

that the foregoing matters of replication might have been introduced by a special traverse.

The protection and immunity afforded by the law of nations to public ministers is grounded entirely upon public policy. It is absolutely essential to the proper discharge of their duties that they should be entirely exempt from the local jurisdiction. This immunity is not personal or granted out of consideration for the minister, but for the power which he represents, and the minister is not permitted to waive it. It is not his privilege, but his master's.

Now consider an analogous case. The President of the United States may, while President, commit murder or some other heinous crime. He nevertheless can not be subjected to the demands of the criminal law while President, for the people of the United States can not be deprived of their President; the Government can not perform its functions without an executive head. But he may be impeached and removed from office, and then, another person being substituded in his stead as President, he can be indicted, tried and hung for the crime committed while President.

The privilege of public ministers, for obvious reasons, extends one step further. They are entitled to safe conduct outside of the territory of the offended Government. But if they choose to remain in that territory after their functions have ceased, and their official business has been terminated, and another has succeeded to them, they do so as private citizens or as ordinary aliens, and they do so at their peril. The

reason of public policy which protected them has ceased, and the immunity has ceased with it. For this reason the defendant is fully and absolutely subject to the jurisdiction of this court, and must abide the results of his trial as any other alien or citizen in like situation.

R. ROSS PERRY,
Special Counsel for the United States.

APPENDIX.

JULES GREVY :

President de la Republique Française
au President des Etats Unis d'Amerique :

Grand et bon ami, Desireux de ne laisser aucune interruption dans les bonnes relations qui subsistent si heureusement entre la France et les Etats Unis d'Amerique, nous n'avous pas voulu differer d'accrediter aupres de Vous, en qualite d'Envoye extraordinaire et Ministre plenipotentiaire, M.

Les qualites qui distinguent cet Agent, son esprit de prudence et de conciliation, son patriotisme eclaire, tout nous est garant qu'il ne negligera rien pour obtenir votre estime et votre confiance. C'est dans cette conviction que nous Vous prions de l'accueillir avec bienveillance et d'ajouter foi et creance entiere a tout ce qu'il Vous dira de notre part, surtout lorsqu'il Vous exprimera les sentiments de notre haute estime et les voeux que nous formons pour la prosperite des Etats Unis d'Amerique.

Ecrit a Paris, le 188 .

Votre bon ami,

JULES GREVY.

Victoria, by the grace of God, Queen of the United Kingdom of Great Britain and Ireland, Defender of the Faith, &c., &c., &c., To the President of the United States of America, Sendeth Greeting!

OUR GOOD FRIEND: Having nothing more at heart than to cultivate and improve the relations of Friendship and Good Understanding which happily subsist between the two countries, we have made choice of our trusty and well-beloved

, in whose Fidelity, Prudence, and other Good Qualities we have the fullest confidence, to reside with you in the character of our Envoy Extraordinary and Minister Plenipotentiary. We trust that the selection of Mr. West for that important post will be agreeable to you; and we entertain no doubt that he will merit your Approbation and Goodwill by a strict observance of the Instructions he has received from us, to manifest to you Our Constant Friendship, and Our sincere desire to preserve and advance on all occasions, the interests and Happiness of both Nations; We therefore request that you will grant a favorable reception to Mr.
in the character of Our Envoy Extraordinary and Minister Plenipotentiary, and that you will give entire Credence to all that he may represent to you in Our Name, especially when in obedience to Our Orders he shall assure you of Our Esteem and regard, and of Our Hearty wishes for the Welfare and Prosperity of the United States. And so, We recommend you to the Protection of The Almighty. Given at Our Court at Windsor Castle the twenty-second day of June, in the year of Our Lord 1881, and in the forty-fifth year of Our reign.

Your Good Friend,

VICTORIA, R. I.,

Granville.

In the Supreme Court of the United States.

October Term, 1883.

IN RE JOHN HITZ,
PETITION FOR WRIT OF CERTIORARI. } No. 12. Original.

Brief for the United States.

STATEMENT OF CASE.

On the 26th day of November, 1883, the above-named John Hitz filed in this court a petition praying for a writ of certiorari to the Supreme Court of the District of Columbia. In his petition he averred substantially that he, being then a political agent of the Swiss Confederation, was, on the 17th day of June, 1881, indicted in the said last named court of certain crimes and misdemeanors. That he pleaded his privilege as said political agent, and that his said plea was upon demurrer thereto over-ruled. Upon consideration of this petition this court ordered a rule to show cause to issue, and to be served upon the Attorney for the United States in and for the District of Columbia. On the——day of December, 1883, the said attorney filed a return to the said rule in which return were averred, substantially, the following facts: that while it was true that the said Hitz, was, at the time of the filing of the indictment complained of, a

political agent of the Swiss Confederation, yet it was further true that at that time and prior thereto, he was and had been a citizen of the United States, and was and had been actively engaged in a certain business, which only a citizen of the United States could legally conduct. Further, that shortly prior to the finding of the said indictment the Swiss Confederation demanded, received and accepted the resignation of the said Hitz as said political agent, and that the said Hitz had since voluntarily remained domiciled within the territory of the said United States at the place where he was indicted, conducting his private business.

Thereupon the said Hitz moved the court that the writ of certiorari should issue as prayed for, because the said return did not contain any copy of the record in the court below.

The cause now comes on to be heard upon the original petition, the rule to show cause, the return thereto, and the motion for the awarding of the writ, notwithstanding the return, which motion may be treated as a demurrer to the return.

Points.

I.

Objection is made to the return that it does not set forth the record below.

Undoubtedly the return to a writ of certiorari ought to certify the record.

But in this case the writ has not issued.

The United States are directed to show cause why it should not issue, and if they can advise the court of any facts which tend to show such cause, they may do so.

The writ of certiorari is a prerogative and a discretionary one.

In re Lord Listowell's Fishery.
9 Irish R.; C. L.; 46, Q. B.;
Regina vs. *Survey*, 5 L. R. (Q. B.,) 466;
Freeman vs. *Oldham*, 4 T. B. Monroe, 420;
Bridge Co. vs. *Magoun*, 8 Me., 293;
Duggen vs. *McGurder*, 1 Miss., 112;
Keyes vs. *Marin Co.*, 42 Cal., 252;
People vs. *Andrews*, 52 N. Y.. 445;
Specht vs. *Detroit*, 20 Mich., 168.

II:

Objection is made that the return embraces facts *dehors* the record below. Whether or not the superior court in considering a record certified by an inferior one in obedience to a writ of certiorari, is confined absolutely to the record, is not settled by authority.

That it is so confined is affirmed by the following authorities:

Redmond vs. *Anderson*, 18 Ark., 449;
Gervais vs. *Powers*, 1 Minn., 45;
People vs. *Wheeler*, 21 N. Y., 82;
Borough vs. *Quakertown*, 3 Grant Cas., 203.

That it may consider facts extraneous to the record is asserted by the following:

Whitney vs. *Board of Delegates*, 14 Cal., 479;
Cullen vs. *Lowry*, 2 Harr., (Del.) 459;
Rutland vs. Worcester, 20 Pick., (Mass.) 71;
Gleason vs. Sloper, 24 Pick., 184.

The true rule would seem to be this:

The superior court, in determining questions involved in the consideration of the issuing or refusing the writ of certiorari, or in the retaining or remanding of the cause certified, will not consider the merits of the cause, but it will, as the writ is a discretionary one, inquire into all jurisdictional matters, whether or not they appear in the record below.

III.

Counsel for the United States, therefore, submit that the return is a proper one, and that the cause should be heard upon the petition, the rule to show cause and the return.

The questions which arise, upon the plea filed by the petitioner to the indictment in the court below, to wit, the legal sufficiency of that plea, the status of the petitioner as Political Agent and Consul General of the Swiss Confederation,—the jurisdiction of this court in cases affecting a consul,—all these questions are considered in the brief filed herewith, which was used in argument before Wylie, J., in the court below.

There are, however, two facts disclosed by the return, which were not considered below, and these are as follows:

A.

The petitioner, while Political Agent as aforesaid, was a citizen of the United States, and was engaged in business which only a citizen of the United States could legally conduct, and was indicted in all respect of alleged crimes growing out of this very business.

B.

The indictment in question was filed, with others, on the 17th day of June, 1881. On the 30th day of May, 1881, the Swiss Confederation demanded the resignation of the said John Hitz as its Political Agent and Consul General, received said resignation on the 15th day, and accepted it on the 20th day of June, 1881. Since the last-named date, the petitioner has remained and still is within the jurisdiction of the court below.

A.

In considering the question of the petitioner's alleged privilege, it is not thought necessary to review at length the recognized authorities upon that subject. While there is some conflict, the preponderance of reason and of authority sustains the following propositions:

The personal liberty of one having the diplomatic *status* cannot be restrained in any way, save for treason against the Government to which he is accredited.

He cannot ordinarily be sued in the municipal tribunals for any civil demand. Especially is this true in the United States, where severe penalties are enacted by Federal statute against anyone procuring to

be issued, issuing, or serving judicial process upon or against any such privileged person.

If, however, he make a specific pledge or bailment of real or personal property, the bailee can enforce his rights *in rem*, notwithstanding this privilege.

If he engage in trade or become an executor or guardian, he makes himself liable to the municipal tribunals, up to the point of actual personal arrest. He can be declared a bankrupt. His stock in trade can be seized.

All this is true of diplomatic representatives in general. Where, however, a power accredits to another one of the latter's own citizens, the former power by receiving him, certainly engages to waive only so much of its claim to his allegiance as his diplomatic duties require. And, *a fortori*, where he engages in local business, peculiar and limited to citizens of his own country, his privileges, and those of the foreign state which permitted him to engage in that business are to be strictly construed, when he claims immunity for acts connected with that business.

Now, in the case at bar, the petitioner, Hitz, a citizen of the United States, was permitted by the government, which he represented, to trade and to do business which only a citizen could do. He has been indicted for crimes growing out of that very business. He has not been arrested or deprived of his liberty; no process has issued against him. He has been simply indicted. The Swiss Confederation makes no complaint. In what respect has international law been violated?

B.

In considering the diplomatic immunities, we must recollect the reasons which support them. The first is that the time and person of the diplomat belong to his sovereign, and can not ordinarily be interfered with. The second is that the honor of the sovereign must be respected in the diplomat who represents it.

But, as has been stated, if the sovereign allow his representative to engage in local trade, or to make himself party to a litigation, or to act as executor, trustee or guardian, the representative must submit to the judgment of the municipal tribunal, only his person and the goods of the embassy being exempt from that jurisdiction in such case. If these matters distract the diplomat's attention from the affairs of his mission, that is his master's concern only. In the case at bar nothing of the kind is suggested.

In one event only, to wit: such misconduct on the part of a diplomatic representative as would argue treason against the government to which he is accredited, can his personal liberty be restrained.

The petitioner has not been arrested or threatened with arrest.

There remains, therefore, to be considered only the affront supposed to be put upon the Swiss Confederation by the indictment of its agent, he being indicted as aforesaid for a crime committed while conducting a business in the United States, as a citizen of the United States, and which only such citizen could conduct. In this case the Swiss Confederation does not complain of the affront. Not only does it not com-

plain, but it has required the resignation of its agent at such time as to suggest that it was advised of his delinquencies and desired to wash its hands of him. It is not necessary to consider here whether the Swiss Confederation could complain, under all the circumstances of this case. The question is, can the discharged agent be now heard to complain of the affront alleged to be offered to his principal, when he has himself caused the affront, and after his principal has repudiated him?

In support of the legal propositions stated above, counsel refer to—

Vattel , Book IV., C. C. VII., VII.;
Wheaton on International Law, (Lawrence), Part III., C. I.;
Bynkershoek, C. XV., XX.;
Merlin, *Ministre Publique*, § VI.

R. ROSS PERRY,
Special Att'y for U. S.

A. S. WORTHINGTON,
U. S. Att'y, D. C.